IN THE

Supreme Court of the United States

October Term, 1971

No. 71-813

JOHN ALLEN FAVRO,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

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The respondent, the State of Washington, respectfully urges that a Writ of Certiorari be denied with respect to the Judgment and Opinion of the Court of Appeals of the State of Washington, Division I, in that Court's Docket No. 537-I, which opinion affirmed appellant's conviction of assault in the first degree, attempted robbery, and assault in the second degree.

I.

REASONS FOR DENYING THE WRIT

1. Advance Judicial Approval Is Not Necessary for Probable Cause Arrest

There is no constitutional requirement that police officers must obtain an arrest warrant prior to arrest where there is probable cause for that arrest. Counsel for appellant incorrectly cites *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S. Ct. 2034 (1969) for the proposition that the fourth amendment to the United States Constitution prohibits a warrantless arrest. Of course, *Chimel* stands primarily for unreasonable searches incident to an arrest. *Chimel* said only this about the arrest in that case:

> Both courts accepted the petitioner's contention that the arrest warrant was invalid because the supporting affidavit was set out in conclusory terms, but held that since the arresting officers had procured the warrant "in good faith," *and since in any event they had had sufficient information to constitute probable cause for the petitioner's arrest, that arrest had been lawful.* (Emphasis added.) 395 U.S. at 754.

The cases relied on by this court do support the proposition that an arrest warrant does not have to be obtained if the officers have sufficient probable cause to believe that the individual had committed a felony.

The record clearly shows that the police officers had probable cause to arrest the appellant. Furthermore, absent an applicable federal statute, the law of the state where an arrest without a warrant takes place determines its validity. *U.S. v. DiRe*, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1947).

The law in the state of Washington is clear on this

matter. In *State v. Todd*, 78 Wn.2d 362, 474 P.2d 542 (1970), the State Supreme Court held that:

> Proper cause for arrest has often been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *State v. Palmer*, 73 Wn.2d 462, 438 P.2d 876 (1968).

Both the *Todd* case, *supra*, and *State v. Harris*, 78 W.D.2d 558 (1970), further stand for the proposition that the determination of probable cause and the reasonableness of the grounds supporting that probable cause must be looked at in the light of the arresting officer's special experience, and not necessarily that of a reasonable, disinterested person. This is not to say, of course, that what a disinterested person might feel about the surrounding circumstances is not relevant, but only that the initial ground and their reasonableness must be examined in the light of the officer's experience.

In the instant case, Officer DeBoer was acting with the background information that two young men had attempted to hold up Vito Rossi, and in so doing had fired shots into the body of Emil Drovetto with a .45 caliber and a .25 caliber gun. Officer DeBoer then testified that he had received information from four separate informants (St. 16). Officer DeBoer further testified as to the reasons he had for believing in the reliability of the informants' information (St. 16). Officer DeBoer testified that the information given to him from his informants was to the effect that John Favro was one of two individuals who held up Vito Rossi and Emil Drovetto and fired the shots wounding Officer Drovetto (St. 17). This information was more explicit than just the general assertion, for DeBoer went on

to testify that the informants told him that one of the weapons, a .45 caliber automatic, was borrowed by Mr. Noble and Mr. Favro from another individual earlier in the evening of the 12th of October, the date of the crime, and that it was subsequently left on the scene (St. 17:16). In fact, the .45 caliber automatic was left at the scene and eventually placed into evidence in the trial. Officer DeBoer went on to testify that he, of his own knowledge, had seen Mr. Noble and Mr. Favro together on more than one occasion, and he further went on to testify that he, Detective McKenna, and Policewoman Johnson had a conversation with one Audrey Ackerly, Gary Noble's girl friend. The extent of the conversation she told to your affiant was that she had received a call from Gary in which he told her that he and John Favro and a third person, had gotten into some kind of trouble in the north end. In response to further questions, Officer DeBoer recalled that one of the informants told him that he, the informant, had been told by John Favro that John Favro had shot a policeman (St. 20).

All of the information testified to by Officer DeBoer, coupled with Officer DeBoer's background as an officer of the Seattle Police Department acting under the orders of investigating detectives in this matter, gave to him sufficient probable cause to make the warrantless arrest of the appellant John Favro. More than just conjecture is present here, and there are circumstances outside the belief of the officer alone sufficient to convince a cautious or disinterested person that the accused might be guilty. We have the statements made to informants by Mr. Favro and the co-defendant Gary Noble; we have the recovery of a gun matching the description received from the informants. We further have the statement of Audrey Ackerly to the in-

vestigating officers regarding statements made to her by the codefendant Noble, and we have the general description of what happened at the scene corroborating the information given to the detectives by the informants.

State v. Todd, supra, at 367 said,

> And in *State v. Poe*, 74 Wn.2d 425, 445 P.2d 196 (1968) we observed that the probable cause for arrest should be examined in the light of the arresting officer's special experience, that the standard should be, not what might appear to be probable cause to a passerby, but what would-be probable cause to a reasonable, cautious, and prudent officer.

The record is clear that there was more than sufficient circumstance to establish probable cause for the arrest of the appellant John Favro.

Counsel for the appellant further mis-cites numerous cases in an attempt to justify an untenable position concerning warrantless arrests. *Trupiano v. U.S.*, 334 U.S. 699, 92 L. Ed. 1663, 68 S. Ct. 191 (1948), does not stand for the proposition that warrantless arrests with probable cause are invalid. In fact, the *Trupiano* court, at 699, held "the absence of a warrant of arrest, even though there was sufficient time to obtain one, does not invalidate an arrest under these circumstances [i.e. with probable cause]. The *Trupiano* court did go on to talk about searches without warrants, but in *Favro* we are only concerned with *arrests*, not *searches*. *McDonald v. U.S.*, 335 U.S. 451, 93 L. Ed. 153, 69 S. Ct. 191 (1945), also concerns *search* warrants, not *arrest* warrants. Similarly, the issue in *U.S. v. Rabinowitz*, 339 U.S. 56, 94 L.Ed. 653, 70 S.Ct. 430 (1950) concerned the legality of *searches* incident to a lawful arrest.

Furthermore, counsel for the appellant misconstrues the holding in *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed.2d 142, 85 S. Ct. 223 (1964). *Beck* did not hold that arrests without warrants are invalid. *Beck* merely held that there were not sufficient facts to constitute probable cause for the arrest of Beck. The facts in the instant case are clearly different than in *Beck*.

Finally, *Katz v. U.S.*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S. Ct. 507 (1967) and *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S. Ct. 1868 (1968) both concern the legality of searches, not arrests.

There being no legal issues for the court to decide in the instant case, appellant's petition for Certiorari should be denied.

2. There Is No Constitutional Mandate That Defense Counsel Has a Right to Be Present When Identification Is Made After a Lineup Where Defense Counsel Was Present During the Actual Lineup, and Where the Defendant Was Not Present When Actual Identification Was Made

The appellant's argument regarding the possibility of error in the lineup proceedings was carefully considered by the trial court following extensive testimony at the preliminary hearing (St. 24-48). All of the circumstances of the lineup were extensively presented during the testimony at the preliminary hearing and the court was fully able to draw the conclusion it did that there was no impermissible suggestiveness nor influence that made the lineup invalid following the rulings and reasonings in *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S. Ct. 1951 (1967); *Wade v. United States*, 388 U.S. 219, 18 L.Ed.2d 1149, 87 S. Ct. 1926 (1967); and *Simmons v. United States*, 390

U.S. 377, 19 L.Ed.2d 1247, 88 S. Ct. 967 (1968).

The trial record clearly shows that there were no irregular or impermissible suggestions made which led to that witness identification of the appellant.

Defense attorney Henry P. Opendack testified that he was present at the lineup in question (St. 25-27). The attorney further testified that during the actual lineup, during the whole time the appellant was confronted by the witness, Officer Drovetto, that the lineup "was a fine lineup, just perfect." (St. 26-27). After viewing the lineup, Officer Drovetto was taken back to his hospital room, at which time he marked his identification sheet.

The trial record is also quite clear that no improper remarks were made by any persons present with Officer Drovetto either before the lineup, during the lineup, or until the officer marked his identification sheet. Lieutenant Thomas R. Smith testified that after the lineup, but before the identification, he explicitly told Officer Drovetto, "Don't say anything about the lineup until you are asked to give a statement." (St. 32). He further testified that in his presence there was no statements made to Officer Drovetto regarding the lineup.

Officer Drovetto was asked, "Did you discuss with anyone your identification of anyone in the lineup until you had marked that sheet?" (St. 34). He answered, "No, sir." (St. 34).

Detective T. R. Fonis, who attended the lineup and later went to the hospital room with Officer Drovetto for the purpose of presenting an identification sheet to Officer Drovetto also testified (St. 35-36). Detective Fonis testified that the only conversation he had with Officer Drovetto

concerning the lineup was, "I explained the form to him and told him in his own handwriting to mark if he could identify anybody to mark it in the individual spot that was supposed to be in." (St. 36).

Appellant's counsel was given ample opportunity to cross-examine all of the state's witnesses, as well as produce witnesses of his own. Not one scintilla of testimony was produced to show that Officer Drovetto was in any way improperly influenced in making his identification of the appellant.

There is a strong line of cases which hold that Sixth Amendment rights are *not* violated where counsel was not present during photograph identification procedures.

United States v. Ballard, 423 F.2d 127 (5th Cir. 1970) is perhaps the best review of Federal cases dealing with photographic indentification of defendants in custody. At page 131, the court said:

> We follow our brethren of the Second, Seventh and Tenth Circuits in holding that *Gilbert* and *Wade*—neither through *Simmons* nor outside *Simmons*—require the counsel for an accused be present at the time of any out-of-court photographic identification, regardless of whether the accused is in custody or not.

See also *United States v. Bennett*, 409 F.2d 888 (2nd Cir. 1969) and *Rech v. United States*, 410 F.2d 1131 (10th Cir. 1969). In *U.S. v. Bennett*, 409 F.2d 888 (2nd Cir. 1969), the court was faced with a question of whether or not to extend *Wade* to require the presence of counsel at an out-of-court photographic identification when the defendant was in custody. Judge Friendly explained why the Sixth Amendment did not apply to a photographic identification regardless of whether the accused was in

custody or not:

> [T]o require that the defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary. None of the classical analysis of the assistance to be given by counsel, Justice Sutherland's in *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and Justice Black's in *Johnson v. Zerbst*, *supra*, 304 U.S. at 462-463, 58 S.Ct. 1019, 82 L.Ed. 1461, and *Gideon v. Wainwright*, *supra*, 372 U.S. at 344-345, 83 S.Ct. 792, 9 L.Ed.2d 799, suggest that counsel might be present when the prosecution is interrogating witnesses in the defendant's absence, even when, as here, the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered. Many other aspects of the prosecution's interview with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews notably with alibi witnesses. *Bennett*, *supra*, at 899-900.

Judge Friendly's strong arguments clearly apply to the situation at hand. There is no meaningful difference between the situation where counsel is present at a lineup and not present when a witness makes a later identification from a photograph of the lineup, and the situation where counsel is present at a line-up but not present when a witness at the lineup, out of the presence of the defendant, later makes an identification. In both situations, counsel was present at all points where the defendant was actually being confronted by the state's witnesses.

Furthermore, on this reasoning each case must rise or fall on the factual situations within each case. As the court said in *Simmons v. United States*, 390 U.S. 377, 383-384,

19 L.Ed.2d 1247, 88 S.Ct. 967 (1968),

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of technique may result in convictions based on mis-identification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, *we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.* (Emphasis added).

There being no legal issues for the court to decide in the instant case, appellant's petition for Certiorari should be denied.

II.

CONCLUSION

For the above-stated reasons, appellant's conviction should stand and his petition for Writ of Certiorari should be denied.

Respectfully submitted,

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